Supreme Court, U.S.
FILED

991633 APR 11 2000

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No. 99-___

In The

Supreme Court of the United States

U.S. BORAX INC.,

Petitioner,

v.

NANCY FORSTER, as Personal Representative of the Estate of CHARLES F. READE, SR.,

Respondent.

On Petition For A Writ Of Certiorari To The Fourth District Court Of Appeal Of The State Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a decedent's estate dispense with providing actual notice of estate administration to contingent, but reasonably ascertainable, creditors – such as claimants for contribution under the Comprehensive Environmental Response, Compensation and Liability Act – consistent with the requirements of due process reaffirmed most recently by this Court in *Tulsa Prof'l Collection Servs., Inc. v. Pope*?

2. Does the three-year statute of limitations established by Congress for contribution claims under CERCLA preempt shorter state statutes governing the administration of decedents' estates?

LIST OF PARTIES

The parties are as stated in the caption.

RULE 29.6 STATEMENT

In accordance with Rule 29.6, Petitioner U.S. Borax Inc. states that its parent corporation is Rio Tinto America Inc.

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PETITION FOR A WRIT OF CERTIORARI

U.S. Borax Inc. ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of the State of Florida in this case.

OPINIONS BELOW

The Opinion of the Florida Court of Appeal is reported at 24 Fla. Law W. D 1220, Case No. 97-4107, 1999 Fla. App. LEXIS 6494 (May 19, 1999). *See* App. at 3-13. The Order of the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida, *see* App. at 14-15, is not officially reported.

JURISDICTION

The judgment of the Florida Court of Appeal was entered on July 23, 1999. The Supreme Court of Florida denied Borax's Petition for Review on January 13, 2000. *See* App. at 1-2. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides that "[n]o State shall

. . . deprive any person of life, liberty, or property, without due process of law[.]"

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Relevant portions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, and the Florida Probate Code are set forth at App. at 39-58.

I. STATEMENT

A. Introduction

Sued for CERCLA contribution, Petitioner in turn sought contribution from the estate of a "potentially responsible party" being probated in Florida. Petitioner seeks review by this Court of rulings by Florida courts that: (1) a decedent's estate may dispense with providing actual notice of estate administration to contingent, but reasonably ascertainable, creditors – such as claimants for contribution under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA") – consistent with the requirements of due process reaffirmed most recently by this Court in *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); and (2) the three-year

statute of limitations established by Congress for contribution claims under CERCLA does not preempt state statutes governing the administration of decedents' estates.

B. Proceedings Below

Involvement of the Florida courts was triggered by events that began in the State of Missouri in 1990 when the Missouri Department of Natural Resources (and later the United States Environmental Protection Agency) began raising concerns about environmental conditions at a former industrial site (the "Site") located in Kansas City. The Site had been operated for decades by the Reade Manufacturing Company ("Reade Manufacturing") as one of its several herbicide facilities. In 1963, Petitioner entered into an agreement to lease Reade Manufacturing's herbicide facilities for five years with an option to purchase the facilities, including the Site. At the end of the five-year term, Petitioner chose not to exercise the option and returned the leased properties to Reade Manufacturing in 1968.

After Petitioner's decision not to exercise its option to purchase the Site, Reade Manufacturing sold the Site and its herbicide facility to another concern, the Horne-Boatright Chemical Company (later Habco, Inc.). Habco, Inc., operated the Site until at least 1986, when a partnership affiliated with Habco, K.C. 1986 Limited Partnership ("K.C. 1986"), took ownership of the by-then inactive property. Reade Manufacturing, however, continued in business in other product lines until 1983. In that year, Charles F. Reade, Sr., the great-grandson of the founder

of Reade Manufacturing, and at that time a long-standing company executive and owner of all of Reade Manufacturing's common stock, sold his entire interest to Reactive Metals & Alloys Corporation ("REMACOR"). REMACOR thereafter operated Reade Manufacturing's business as a division under the fictitious name Reade Manufacturing Company.

In 1992, K.C. 1986 sent a demand letter to REMACOR alleging that, as the successor to Reade Manufacturing, REMACOR was responsible for cleaning up contamination (mainly arsenic) from the Site. The following year, K.C. 1986 filed an environmental action, under CERCLA, in the United States District Court for the Western District of Missouri against REMACOR and Petitioner.[1] The Missouri federal district court established a March 14, 1997 deadline for the addition of new parties. In early March 1997, during a computer database inquiry performed by its counsel to determine if new parties should be added, Petitioner first learned of Charles F. Reade, Sr.'s death on May 16, 1995. On April 22, 1997, Petitioner filed a Third-Party Complaint against Nancy Reade Forster, as the Personal Representative of the Estate of Charles F. Reade, Sr. (the "Estate"). Petitioner sought contribution from the Estate to pay for past and future

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[1] The following parties were later added as defendants and third-party defendants in the Missouri federal proceedings: Hardee's Food Systems; Terracon Environmental, Inc.; Habco, Inc.; Donald E. Horne; Victor A. Horne, Jr.; DEH Merrywood Co.; Habco International, Inc.; Nancy Reade Forster, as Personal Representative of the Estate of Charles F. Reade, Sr.; Burlington Northern Railroad Company; British Aluminum Limited; and Magnesium Elektron, Inc.

response costs resulting from the contamination of the Site, contending that Charles F. Reade, Sr. (and, since his death, his successor Estate) was liable as an "operator" of a site where hazardous substances were disposed and released. A Third-Party Summons and Complaint were served on Ms. Forster by mail on April 29, 1997.

C. Florida State Court Proceedings

1. Florida Probate Court

As a protective measure, on May 15, 1997, Petitioner filed a statement of claim in Florida probate proceedings that the Estate had initiated in the Probate Division of the Circuit Court for Martin County, Florida. Estate administration had commenced when the Estate filed a Notice of Administration on June 5, 1995. Under the Florida Probate Code requirements, Florida Statutes § 733.702 (App. at 50-52), creditors are normally required to file claims within three months after estate administration commences. Petitioner's statement of claim requested that the probate court grant it an extension of time for filing the claim against the Estate.

In support of its request for an extension, Petitioner contended, first, that it should have been provided actual notice of the administration of the Estate because, under *Pope*: (1) it was "reasonably ascertainable" as a creditor under the circumstances; and (2) constitutional due process required actual notice or at least notice in a newspaper of national circulation. Petitioner had not received actual notice of Charles F. Reade, Sr.'s death or of the commencement of the Estate's administration. Nor had Petitioner received effective constructive notice; the only

notices of administration published by the Estate were in small-town local newspapers in Florida and North Carolina. Second, Petitioner argued that the CERCLA three-year statute of limitations preempted the three-month Florida limitations period. The Estate opposed Petitioner's claim as untimely.[2]

On October 22, 1997, the probate court held, *inter alia*, that: (1) as a contingent claimant, Petitioner was not entitled to actual notice of Charles F. Reade, Sr.'s death and that the Estate's newspaper notices of the probate claims bar date satisfied constitutional due process requirements; (2) Petitioner was not a reasonably ascertainable creditor nor known to the personal representative of the Estate; and (3) CERCLA did not preempt the three-month Florida statute. *See* App. at 14-15.[3]

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[2] On June 16, 1997, Petitioner moved for summary judgment in the Missouri federal proceedings on its CERCLA claims against the Estate. Thereafter, on September 17, 1997, Petitioner moved the Florida probate court to stay any ruling on the petition for an extension of time to file until the Missouri federal district court acted on the summary judgment motion. Petitioner argued that the parties had already fully briefed and submitted for a ruling in the federal proceeding both the questions of CERCLA preemption and due process at issue before the probate court. On October 1, 1997, the probate court denied Petitioner's motion to stay.

[3] After the probate court's ruling, the Estate moved in the Missouri federal district court to dismiss Petitioner's CERCLA complaint based on collateral estoppel grounds, invoking the federal full faith and credit statute, 28 U.S.C. § 1738. On January 30, 1998, the federal court denied Petitioner's summary judgment motion regarding the Estate's liability (based on the existence of disputed facts as to Charles F. Reade, Sr.'s personal liability as an "operator" under CERCLA), but held that

2. Florida Fourth District Court of Appeal

Petitioner appealed the Florida probate court's ruling to the Florida Fourth District Court of Appeal. On May 19, 1999, that court affirmed, *inter alia*, the probate court's determinations that CERCLA does not preempt the Florida Probate Code's three-month filing limitations period and that Petitioner was not entitled to actual notice of the Estate's administration and the three-month bar date. *See* App. at 3-13.

With respect to the preemption issue, the District Court of Appeal relied primarily upon the reasoning of the United States Court of Appeals for the Third Circuit in *Witco Corp. v. Beekhuis*, 38 F.3d 682 (3d Cir. 1994). In *Witco*, the Third Circuit held that CERCLA's three-year statute of limitations for contribution claims did not preempt Delaware's eight-month statutory deadline, based upon its application of the federal preemption analysis

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CERCLA preempts Florida's three-month probate limitations period. *See* App. at 26-38. The court also denied the Estate's motion to dismiss, holding that Petitioner was not barred on collateral estoppel grounds from litigating the question of whether CERCLA preempts the Florida statute. *See* App. at 16-25. The court held, however, that principles of collateral estoppel prevented Petitioner from revisiting the ruling of the Florida probate court that Petitioner was afforded constitutionally-adequate notice by the Estate. *See* App. at 23-24. No appeals were taken by either party from those district court rulings. In December 1998, the Missouri federal district court granted the parties' joint request for a voluntary dismissal without prejudice of all claims, cross-claims, and third-party claims pending the selection by the United States Environmental Protection Agency of a remedy for the Site, when total cleanup costs will be more predictable.

set out by this Court in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). Finding *Witco* "persuasive" authority, the Florida Fourth District Court of Appeal agreed with the Third Circuit's determinations that, "in enacting CERCLA Congress has not explicitly preempted all state law on environmental subject matters, nor has Congress enacted such a comprehensive scheme of regulation as to provide no room for supplementation by the states." *Witco*, 38 F.3d at 687. Finally, it found that there was no conflict between CERCLA and Florida's three-month statute since "compliance with both statutes was possible." App. at 7-11.

The Fourth District Court of Appeal also affirmed the probate court's determination that Petitioner was not entitled to actual notice. *See* App. at 12-13. It held in effect that the lower court had properly followed its own earlier precedent on that issue, *U.S. Trust Co. of Fla. Sav. Bank v. Haig*, 694 So. 2d 769 (Fla. 4th DCA 1997) (App. at 59-64).[4]

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[4] In *Haig*, the Fourth District Court of Appeal interpreted this Court's statement in *Pope* that "it is reasonable to dispense with actual notice to those with mere conjectural claims," *Pope*, 485 U.S. at 490, to mean that those with *contingent* claims were also not entitled to actual notice. Hence, it held in that case that actual notice was not due even to persons whose identities and whereabouts were fully known to the decedent's personal representative if their claims depended upon "some future event" that might or might not happen. *Haig*, 694 So. 2d at 771. In the case here in which certiorari is being sought, the Fourth District Court of Appeal declined Petitioner's request that the court reconsider its decision in *Haig*. Petitioner had urged it to "reconsider and modify its holding in *Haig* so that 'contingent', as distinguished from 'conjectural' claimants who are known or reasonably ascertainable, are entitled to receive actual notice, just like non-contingent claimants known to the Estate."

On July 2, 1999, the Fourth District Court of Appeal denied Petitioner's motion that the case be certified to the Supreme Court of Florida to give that court the opportunity to review on policy grounds the question of whether a state court should stay consideration of a federal preemption issue when that same issue is pending before a federal court.[5]

3. Supreme Court of Florida

On January 13, 2000, the Supreme Court of Florida declined to accept, pursuant to article V, section 3(b) of the Florida Constitution, discretionary review of the decision of the Fourth District Court of Appeal.

II. REASONS FOR GRANTING THE PETITION

The decision of the Florida Fourth District Court of Appeal warrants review by this Court because it places two major obstacles, operating in tandem, in the path of effective enforcement of an important federal statute, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), "enacted in response to the serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998).

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[5] The Fourth District Court of Appeal had held that the probate court had not abused its discretion in denying Petitioner's motion to stay the probate proceedings pending the Missouri federal district court's resolution of the preemption and adequacy of notice issues. *See* App. at 11-12.

Central to that remedial scheme is the principle that "those actually responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions." *Id.* at 55-56.

Customarily, CERCLA litigation cases are bifurcated into issues of liability and damages, with liability determinations being made first. Claims are not typically brought immediately against all potential defendants because it is not cost-effective for the litigants or the courts to consider all potential defendants until the costs of remedial action are better known. In addition, time is typically required to develop sufficient information about a party's responsibility under the law. As a result, in many cases, as here, a claim will not be filed and litigated until years after the initial filing of a CERCLA cost-recovery lawsuit.

For that reason, the Florida District Court of Appeal's ruling that "contingent" claimants are not entitled to actual notice by a decedent's estate significantly disrupts the orderly resolution of CERCLA litigation, since CERCLA claims may, by definition, be "contingent" and unliquidated for many years or (as here) even decades. As a result of the Florida court's misreading of *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988), CERCLA claimants in Florida, even ones that are "known or reasonably ascertainable," may be denied, as here, sufficient due process to ensure that the estates of parties

liable for cleanup costs are not absolved of their responsibilities under the Act.[6]

The second obstacle is the Florida appellate court's determination that Florida's three-month limitations period for filing claims in probate proceedings is not preempted by CERCLA's three-year statute of limitations. If adopted more widely, that ruling would basically stand the Act on its head, given the realities of the CERCLA litigation process described above. Congress quite plainly intended CERCLA's limitations provisions to preempt shorter statutes of limitations, concerned as it was with long-term responsibility for long-term environmental problems. Unlike the conclusion reached by the Florida court here and by one federal court of appeals, four federal district courts (including the federal district court with jurisdiction over the Estate in the Missouri CERCLA litigation) have ruled that the three-year limitations period contained in CERCLA preempts shorter state probate limitations periods. Clarification in this regard is called for to ensure that these state laws do not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in CERCLA. *California Fed. Sav. & Loan Assoc. v. Guerra*, 479 U.S. 272, 280-81 (1987).

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[6] Indeed, CERCLA claimants *anywhere* in the country with claims against potentially responsible parties domiciled in Florida are affected by this ruling.

A. The Ruling Below That A Decedent's Estate May Dispense With Providing Actual Notice To "Contingent," But Reasonably Ascertainable, Creditors – Such As Claimants For Contribution In Accordance With CERCLA – Is Inconsistent With The Requirements Of Due Process Reaffirmed Most Recently By This Court In *Tulsa Prof'l Collection Servs. v. Pope* And Undermines Congressional Intent That Everyone Who Is Responsible For Hazardous Waste Contamination Should Contribute To The Costs Of Cleanup.

In *Pope*, this Court held that the Due Process Clause of the Fourteenth Amendment requires a decedent's estate to provide actual mail notice of an estate's administration if the identity of a claimant is "reasonably ascertainable" through "reasonably diligent efforts." *Pope*, 485 U.S. at 490. *Pope* follows a long line of decisions by this Court, from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), through *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), designed to underscore the fundamental principle that

> [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane, 339 U.S. at 314.

Nine years after *Pope*, the Florida Fourth District Court of Appeal decided *U.S. Trust Co. of Florida Sav. Bank v. Haig*, 694 So. 2d 769 (Fla. 4th DCA 1997), a decision

upon which the same court relied in ruling that Petitioner was not entitled to actual notice from the Estate in this litigation. Seizing upon a snippet taken from the *Pope* opinion, the Florida court fashioned a narrow doctrine hostile to *Pope* – one that, in fact, completely relieves decedents' estates of providing actual notice to contingent claimants like Petitioner, with dire consequences generally for those seeking contribution in CERCLA cost-recovery suits.

In *Pope*, this Court stated as follows: "Here as in *Mullane*, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims." *Pope*, 485 U.S. at 490. The Florida court's *Haig* decision, however, interpreted *Pope* to mean that "[actual] notice is not due to *contingent* or conjectural claimants." *Haig*, 694 So. 2d at 771 (emphasis added). That court, in other words, plainly confused "contingent" claims with the "conjectural" ones exempted by *Mullane* and *Pope* and reasoned that the two were one and the same. It therefore ruled that actual notice of estate administration was not owed to General Alexander Haig, who had purchased a home from the decedent; the decedent had executed a guaranty against structural defects. The Florida court ruled that the General's claim was "contingent" because he had not yet proved in court that the home had actionable defects or the amount of damages. Consequently, it held that no actual notice was necessary. In this case, the same Florida appeals court rejected Petitioner's Due Process arguments with the terse comment: "We decline Borax' invitation to reconsider our decision in *Haig*." App. at 13.

The Florida court's reading of *Mullane* and *Pope* places a major obstacle in the path of effective enforcement of CERCLA, since claims under that federal statute are by definition "contingent" and unliquidated – but that does not mean that they are in any sense "conjectural."[7] A careful reading of *Mullane* reveals that certain "conjectural" claimants need not be given notice because the burden of determining their identity is too great, *see Mullane*, 339 U.S. at 317-18; "contingent" claimants by contrast may be perfectly obvious. For CERCLA litigation, what *Haig* means is that a decedent's estate may be aware that a cost-recovery action is pending involving a site for which the decedent was a responsible party and yet may have no duty to provide actual notice of the decedent's death to claimants in that litigation. Indeed, according to the Florida court's rationale in *Haig*, the estate could intentionally (and with impunity) allow the state's three-month claim period to run. Review by this Court is warranted because such an outcome is fundamentally inconsistent with *Pope* and deeply inimical to the enforcement scheme Congress envisioned in enacting CERCLA.

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[7] The reasoning in *Haig* poses a threat to contingent claimants generally. Florida probate law specialists have written that "*Haig* represents a small but significant retreat from *Pope* and could prove extremely troublesome to contingent creditors. . . . " Simon and Hennessey, *Estates, Trusts, & Guardianships: 1998 Survey of Florida Law*, 23 Nova L. Rev. 119, 132-33 (Fall 1998). Moreover, jurisdictions other than Florida have struggled with the "contingent vs. conjectural" dichotomy. *See In re Estate of Anderson*, 615 N.E.2d 1197 (Ill. App. 1993); *In re Estate of Reynolds*, 970 P.2d 537 (Kan. 1998).

B. The Ruling Below That The Three-Year Statute Of Limitations Established By Congress For Contribution Claims Under CERCLA Does Not Preempt Shorter State Statutes Governing The Administration Of Decedents' Estates Poses An Obstacle To The Accomplishment And Execution Of The Full Purposes And Objectives Of That Act.

One of CERCLA's key purposes is to require responsible parties to clean up hazardous waste sites. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). To help accomplish this objective in view of the fact that environmental problems may not come to light for decades after relevant acts of pollution, CERCLA contains its own, liberal statute of limitations:

> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced –
>
> (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and
>
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

42 U.S.C. § 9613(g)(2) (App. at 42-43). CERCLA also provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> (A) the date of judgment in any action under this Act for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 122(g) (relating to de minimis settlement) or 122(h) (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3) (App. 43-44). As the facts of this case indicate, Congress acted wisely in this regard. At the time Petitioner filed its claims against the Estate, Site conditions were still being investigated. There had not yet been any cleanup activity, nor had there been a judgment or settlement. Therefore, the CERCLA limitations period had not even begun to run on Petitioner's contribution claims against the Estate.

Consistent with *Guerra*, 479 U.S. 272, most federal courts have concluded that probate limitations are preempted and therefore invalid under the Supremacy Clause of the United States Constitution because they stand in the way of accomplishing CERCLA's purpose. *See Steego Corp. v. Ravenal*, 830 F. Supp. 42, 47-48 (D. Mass. 1993) (Rhode Island probate statute preempted due to "CERCLA's broad remedial purpose and Congress's expressed intent that those responsible for hazardous waste sites bear the cost of cleaning them up") (internal

quotes omitted); *Soo Line R.R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1485 (D. Minn. 1992) ("[t]o the extent that the state [probate] law purports to release responsible parties from liability for releasing hazardous wastes into the environment, CERCLA preempts state law"); *Freudenberg-NOK Gen. Partnership v. Thomopoulous*, Case No. C91-297-L, 1991 U.S. Dist. LEXIS 19421, at **7-9 (D.N.H. Dec. 9, 1991) (New Hampshire's six-month probate limitations period preempted because CERCLA's legislative history left "little doubt" that "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created") (citations omitted).

There is a clear judicial conflict in this very case on the preemption issue. The Missouri federal district court has held that CERCLA preempts Florida's probate limitations period, while the Florida courts have reached the opposite conclusion. Noting that "Congress intended CERCLA to be uniformly enforced in federal court using federal law[,]" App. at 33, the Missouri federal district court based its decision on several key factors, including that: (1) Charles F. Reade, Sr.'s Estate was still open at the time the CERCLA claim was filed against it; (2) Congress intended that CERCLA actions be prosecuted under federal law, not state law; (3) CERCLA liability exists "notwithstanding any other provision of rule or law . . . [,]" 42 U.S.C. § 9607(a); *see also* 42 U.S.C. § 9613(f)(1) (CERCLA contribution actions are "brought according to the Federal Rules of Civil Procedure and shall be governed by federal law"); (4) "[a] federal statute of limitations is especially important because Congress knew that

CERCLA liability would extend to past owners or operators" and, given the likely lag time between contaminating activities and a resulting CERCLA lawsuit, the probate limitations period might run before a suit is filed, increasing the risk that the public will be required to bear the expense of a cleanup, rather than the responsible party as Congress intended; and (5) the polluting party must pay for the cleanup and, because an estate is a fictional entity created by the law as an extension of the decedent, "an estate . . . cannot be innocent if the decedent is not innocent." App. at 35.

By contrast, the Florida appeals court ruled that CERCLA does *not* preempt Florida's three-month probate limitations period. The Florida court relied solely on a decision by the Third Circuit Court of Appeals, *Witco Corp. v. Beekhuis*, 38 F.3d 682 (3d Cir. 1994), without discussing or even mentioning the federal district court cases that have gone the other way, including the Missouri federal district court's decision that intervened between the decisions of the Florida probate court and the Florida Court of Appeal.

Witco is the only federal case (and the only appellate decision to address the issue) that has ruled that CERCLA does not preempt state probate provisions. In *Witco*, the Third Circuit concluded that CERCLA did not preempt Delaware's statute because, *inter alia*: (1) Congress did not expressly preempt state probate laws through CERCLA, and it was possible to comply with both CERCLA's and Delaware's limitations periods; (2) probate issues are traditionally within the states' realm, and

states have an interest in the prompt settlement of probate; (3) the Delaware statute did not obstruct congressional intent; and (4) preemption would be unworkable because a CERCLA suit could arise long after the settlement of an estate, which could compromise the "goals of certainty and promptness in the settlement and distribution of decedent's estate." 38 F.3d at 689-90.

The practical result of the Third Circuit's approach, however, is that CERCLA's limitations period would be displaced altogether for claims against estates. It would require, instead, that claims for contribution under CERCLA be based on at least fifty state probate limitations periods. Such a result would frustrate Congress' intent that polluters pay and would also inappropriately burden the federal courts, because claimants would be forced to initiate CERCLA actions – not within CERCLA's limitations period – but rather within the appropriate state probate limitations periods, which are generally (as with Florida's three-month period) very short.

Resolution of these conflicting federal and state court views regarding CERCLA preemption turns upon nothing less than whether state statutes governing the administration of decedents' estates will be allowed to stand as obstacles "to the accomplishment and execution of the full purposes and objectives of Congress[,]" including the principle that the polluter pays.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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April 11, 2000

APPENDIX

Supreme Court of Florida

THURSDAY, JANUARY 13, 2000

CASE NO.: SC96258
Lower Tribunal No.: 4D97-4107

U.S. BORAX, INC. vs. NANCY FORSTER, ETC.

Petitioner Respondent

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, WELLS, ANSTEAD, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Debbie Causseaux (SEAL)
Debbie Causseaux
Acting Clerk, Supreme Court

Served:
Sylvia H. Walbolt
Roger Dean Schwenke
Joseph H. Lang, Jr.
Jody H. Oliver
Edna L. Caruso
Hon. David Harper, Judge
Drew S. Days, III
Hon. Marshal Stiller, Clerk
Barry S. Sandals
Hon. Marilyn Beuttenmuller, Clerk
David E. Shay

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1999

U.S. BORAX, INC.,

Appellant,

v.

NANCY FORSTER, As Personal Representative of the Estate of **CHARLES F. READE, SR.,**

Appellee.

CASE NO. 97-4107

Opinion filed May 19, 1999

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; David J. Harper, Judge; L.T. Case No. 95-297 CP.

Roger D. Schwenke, Steven C. Dupre, and Susan L. Landy of the Law Office of Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.A., Tampa, for appellant.

Edna L. Caruso of the Law Office of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach, and Jody H. Oliver of the Law Office of Gary, Dytrich & Ryan, P.A., North Palm Beach, for appellee.

TAYLOR, J.

The issue in this case is whether the federal Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 USC § 9601 *et seq.*, preempts Florida's nonclaim statute for filing claims against estates, Fla. Stat. section 733.702 (1995). U.S.

Borax, Inc. ("Borax") appeals two orders entered by the Martin County probate court in favor of appellee, Nancy Forster, the personal representative of the Estate of Charles F. Reade. We find that the probate court correctly ruled that CERCLA does not preempt Florida's nonclaim statute and that the court did not abuse its discretion in denying Borax's request for an extension and motion for a stay to allow the federal court to first decide the preemption and notice issues.

On May 26, 1995, Nancy Forster, as Personal Representative of the Estate ("the Estate") of her father, Charles F. Reade, Sr. ("the decedent") filed a petition for the administration of his estate in Martin County, Florida. Forster was appointed personal representative of the Estate on May 31, 1995. In May, 1995, the decedent's obituary was published in the *New York Times*, the *Newark Star-Ledger*, *The Providence Rhode Island Press*, the *Stuart County News*, *The Carteret Times* and another newspaper in North Carolina. Beginning on June 5, 1995, Forster published a Notice of Administration of the decedent's estate in newspapers in Stuart and Port St. Lucie, Florida and in Carteret County, North Carolina. The three month period for filing claims against the estate expired on September 5, 1995.

On May 15, 1997, approximately a year and eight months after the claims period expired, U.S. Borax, Inc. ("Borax") filed a claim against the Estate in probate court. Borax's claim was based upon a lawsuit filed in 1993 by current owners of property in North Kansas City, Missouri against Borax and Reade Manufacturing Company ("RMC"), a Division of Reactive Metal & Alloys Corporation (REMACOR), in a Missouri federal district court

under CERCLA. The civil action sought to recover the costs of cleaning up the property, which had allegedly been contaminated when previously occupied by the defendants and used as a herbicide blending facility. According to Borax's claim, the decedent had been an officer of RMC and exercised operational control of the facility. Borax claimed that it was entitled to contribution from the decedent toward the cost of cleaning up the property.[1]

In 1997, the federal district court established a deadline of March 14, 1997 for the joinder of additional parties to the CERCLA lawsuit. Soon thereafter, REMACOR announced that it was insolvent. Borax's counsel then conducted a computer data inquiry in early March of 1997 to identify and locate other potential defendants. This computer search led to the decedent's obituary in the *New York Times*. On April 28, 1997, Borax filed a third party complaint against the Estate in the federal proceeding. Additionally, Borax filed a claim against the Estate in the Florida probate proceedings on May 15, 1997, along with a petition for extension of time to file its claim pursuant to sections 733.702 and 733.710, Florida Statutes. Borax acknowledged in the petition that its claim was contingent and unliquidated.

---

[1] CERCLA imposes liability upon those persons who fall within one of four groups – owners of contaminated property, operators of contaminated property, persons who arranged for the disposal or treatment of hazardous substances, and persons who transported hazardous substances there. 42 U.S.C. § 9607(a).

In response to the complaint filed in the CERCLA action, the Estate asserted that Borax's claim was barred by Florida's three-month claims filing limitations period. On June 16, 1997, Borax moved for summary judgment in federal court, arguing that the decedent was personally liable as an "operator" under CERCLA. Borax further argued that the limitations period in the Florida probate code is preempted by CERCLA's three-year statute of limitations, and that barring its claim under section 733.702 violated due process because Borax was not given actual or effective constructive notice of the Estate.

In the probate court proceedings, the Estate filed a petition to strike Borax's claim. Prior to the evidentiary hearing on the petition, Borax moved to stay the probate administration proceedings pending the federal court's resolution of the federal preemption and constitutional issues raised by Borax in its summary judgment motion. Essentially, Borax argued that comity and judicial economy warranted a stay of the probate proceeding pending the outcome of the summary judgment motion in federal court. The probate court denied the motion to stay and proceeded with an evidentiary hearing on the Estate's petition to strike on October 20, 1997.

Following the evidentiary hearing, the probate court granted the Estate's petition to strike Borax's untimely filed claim and denied Borax's petition for an extension to file a claim. The court ruled that CERCLA does not preempt section 733.702, Florida Statutes (1995). It also concluded that Borax was a contingent claimant not entitled to actual notice of decedent's death; that the publication notice to creditors provided by the personal representative comported with sections 733.212 and

733.702, Florida Statutes, which statutes satisfy constitutional due process mandates; that Borax was not a reasonably ascertainable creditor nor known to the personal representative; that the trust fund theory was inapplicable as an exception to the non-claim statute for a contingent claimant not identifying a specific piece of property; that lack of interference with administration of the Estate did not constitute grounds for an extension under section 733.702, Florida Statutes; and that granting an extension would unduly interfere with the Estate's administration. Borax appeals from both the order denying its motion to stay and the order denying its petition for extension of time.

On January 30, 1998, the federal district court denied Borax's summary judgment motion, concluding that there were disputed issues of fact as to whether operator liability could be imposed personally on the decedent. However, contrary to the probate court's ruling, it determined that the longer CERCLA statute of limitations preempted Florida's three-month nonclaim statute and that a trust should be imposed on the Estate's assets to guarantee any judgment against the Estate. In a separate order, the federal court denied the Estate's motion to dismiss Borax's CERCLA claim, rejecting the Florida probate court's resolution of the CERCLA preemption and due process notice issues.

We agree with the probate court's ruling that CERCLA does not preempt Florida's nonclaim statute for filing claims against an estate. Although there is little case law authority on this issue, we find *Witco Corp. v. Beekhuis*, 38 F.3d 682 (3d Cir. 1994), to be persuasive. Witco, the owner of a contaminated site, brought a

CERCLA claim for contribution against Jeanne Beekhuis, the daughter of Dr. H. Beekhuis and executrix of his estate. Dr. Beekhuis was an officer, director and majority stockholder of the company which had owned the contaminated land. In 1988 Witco had notified Dr. Beekhuis of his potential liability under CERCLA. In 1989 Dr. Beekhuis died. However, Witco did not seek contribution until 1990, when it petitioned the state court for a constructive trust on the assets of Dr. Beekhuis' estate. The district court dismissed the petition for failure to state a cause of action. In 1991, when the EPA notified Witco that it was a potentially responsible party (PRP) under CERCLA for the disposal of hazardous waste, Witco filed a claim against the estate. The district court granted the estate's motion for summary judgment on the contribution claim, based upon the fact that Delaware's eight-month nonclaim statute had expired, and also denied Witco's petition to imposes [sic] a constructive trust on the estate assets. In affirming the district court, the third circuit held that CERCLA's three-year statute of limitations for contribution claims does not preempt state nonclaim statutes. *Id.* at 684.

In *Witco*, the third circuit applied the Supreme Court's analysis of federal preemption of state law in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987), stating as follows:

> In determining whether a state statute is preempted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. Federal law may supersede state law in several different ways. First, when acting

> within constitutional limits, Congress is empowered to preempt state law by so stating in express terms. Second, congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. . . .
>
> As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless preempt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because 'compliance with both federal and state regulations is a physical impossibility,' or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Witco, 38 F.3d at 687.

With respect to the first and second bases for preemption of state law under *Guerra*, the third circuit noted its prior decisions holding that "in enacting CERCLA Congress has not explicitly preempted all state law on environmental subject matters, nor has Congress enacted such a comprehensive scheme of regulation as to provide no room for supplementation by the states." *Witco* at 687 (citing *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-26 (3d Cir. 1991)). Regarding the third basis for preemption – i.e., conflict between the state and federal laws, the court concluded that it was possible for Witco to have complied with both the federal and the state statutes. Delaware's eight-month nonclaim statute and CERCLA's three-year period for filing a contribution claim were not mutually exclusive, because a claimant could notify an estate of a

contingent claim within eight months of a decedent's death, and also file a contribution action within three years. While recognizing that there could be instances where a claimant would be unable to comply with both the state nonclaim statute and the CERCLA statute of limitations, because a claimant did not become aware of his or her own CERCLA liability until after a nonclaim statutory period had expired, the court nevertheless concluded that preemption is not appropriate. Rather, the court reasoned that the primary focus is whether a nonclaim statute presents an "obstacle" to the aims and objectives of CERCLA.

In determining that Congress could not have intended to preempt state law governing claims against decedents' estates, the court stated:

> First, and most significantly, a state's interest in the prompt settlement of its citizens' estates is particularly strong. Probate law . . . has traditionally been within the province of the individual states. Longstanding precedent recognizes that federal claims against decedents' estates are subject to state probate laws and procedures, unless federal law specifically provides otherwise.

Id. at 688-689 (citations omitted).

Additionally, *Witco* pointed out that nothing in the language of CERCLA excepts it from probate laws; that Congress provided for an "innocent landowner" defense which would apply to one who inherits contaminated property; and, that pursuant to the Federal Rules of Civil Procedure, the capacity of an individual to sue or be sued under CERCLA is determined by state law. *Id.* at 689.

For the same reasons explained in *Witco*, we find that CERCLA's three-year statute of limitations does not preempt Florida's nonclaim probate statute. Here, there was no conflict between the state and federal laws, since compliance with both statutes was possible. Borax knew of the decedent's identity and potential liability under CERCLA and could have filed its contribution claim against him prior to his death in 1995; instead it chose to exclude the decedent from its original suit against several other parties. Additionally, as pointed out in *Witco*, Borax could have conducted its computer inquiry, notified the estate within the three month period allowable under section 733.702, and filed a contribution action within the three years provided by CERCLA. It was not physically impossible for Borax to comply with both the state and federal statutes. Borax's ill-timed decision to pursue its claim against the decedent is not a sufficient basis to justify preempting Florida probate law and disturbing what has traditionally been within the province of the states. Unless federal law specifically provides otherwise, long standing precedent favors subjecting federal claims against decedents' estates to state probate laws and procedures and recognizes the state's paramount interest in the prompt and final settlement of its citizens' estates.

Next, we find that the probate court did not abuse its discretion in denying Borax's motion to stay the probate proceedings pending the district court's resolution of the preemption and adequacy of notice issues. Because the federal and state courts did not have concurrent jurisdiction, we find that the rule of priority, relied upon by Borax, does not apply in this case. *Cf. Lawyers Professional Liability Ins. Co. v. Shand, Morahan & Co.*, 394 So.2d 238

(Fla. 1st DCA 1981) (citing *Wade v. Clower*, 114 So. 548 (Fla. 1927)) ("In the interests of state and federal comity, where there is *concurrent jurisdiction*, the general rule is that the court whose jurisdiction first attaches may determine the controversy, and the proceedings in the last action filed should be stayed or suspended until the first action is tried and determined.") (emphasis supplied). The federal and state actions implicated in this case are not between the same parties and do not involve the same issues. The federal CERCLA claim is an *in personam* action to recover cleanup costs in connection with contaminated property and is before the district court pursuant to federal question jurisdiction. The state action is an *in rem* probate action for the distribution of the decedent's estate and is before the circuit court pursuant to Florida probate laws. Because of the exclusive jurisdiction of each court, this case is distinguishable from those cases cited by Borax, which hold that it is appropriate to stay duplicate proceedings where the resolution of the federal action would obviate the need to pursue the state action. *See* 42 U.S.C. § 9613(b); Art. V, § 20(c)(3), Fla. Const. Whether Borax's claim was timely filed in the probate court and whether Borax should have been granted an extension to file an untimely claim in that court are probate issues, which only the probate judge had jurisdiction to determine.

Finally, we reject Borax's contention that the probate court erred in denying its request for an extension to file a claim against the estate. We agree with the probate court's determination that Borax was not entitled to actual notice. *See U.S. Trust Co. of Florida Savings Bank v.*

Haig, 694 So.2d 769 (Fla. 4th DCA 1997). We decline Borax's invitation to reconsider our decision in *Haig*.

Accordingly, we affirm the probate court's orders granting the Estate's petition to strike Borax's untimely filed claim and denying Borax's Motion to Stay and Petition for Extension of time to file its untimely claim.

AFFIRMED.

POLEN and GROSS, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA

CASE NO: 95-297 CP

IN RE: ESTATE OF CHARLES F. READE, SR.

Deceased.

_____/

ORDER GRANTING ESTATE'S PETITION TO STRIKE UNTIMELY FILED CLAIM AND DENYING BORAX'S PETITION FOR EXTENSION TO FILE A CLAIM

THIS CAUSE having come before the Court at an Evidentiary Hearing held on October 20, 1997, on the Estate's Petition To Strike Untimely Filed Claim And Borax's Petition for Extension to File a Claim and the Court having heard the testimony of witnesses and argument of counsel, it is hereby

ORDERED AND ADJUDGED that the Estate's Petition to Strike Untimely Filed Claim is granted and Borax's Petition for Extension to File a Claim is denied on the following grounds:

A. The publication notice to creditors provided by Nancy Forster, Personal Representative of the Estate of Charles F. Reade, Sr., comported with Florida law, specifically Sections 733.212 and 733.702, Florida Statutes (1995), which statute satisfies constitutional due process mandates. As a contingent claimant, Borax is not entitled to actual Notice;

B. The court finds Borax was not a reasonably ascertainable creditor nor known to the Personal Representative;

C. The trust fund theory is inapplicable as an exception to the nonclaim statute for a contingent claimant not identifying a specific piece of property;

D. CERCLA does not preempt Section 733.702, Florida Statutes (1995);

E. Lack of interference with administration of the Estate does not constitute grounds for an extension under 733.702, Fla. Stat. (1995); however, granting an extension would unduly interfere with this Estate's administration.

The court specifically reserves jurisdiction to assess fees and costs.

DONE AND ORDERED in Chambers, Martin County, Florida this 22nd day of October, 1997.

/s/ David J. Harper
The Honorable David J. Harper,
Acting Circuit Court Judge

Copies furnished:

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

K.C. 1986 LIMITED PARTNERSHIP, Plaintiff, v. READE MANUFACTURING, et al., Defendants. v. HABCO, INC., et al., Third-Party Defendants.	)	Case No. 93-1062-CV-W-5

ORDER DENYING U.S. BORAX'S MOTION TO STRIKE THE ESTATE OF READE'S MOTION TO DISMISS AND ORDER DENYING THE ESTATE OF READE'S MOTION TO DISMISS CLAIMS OF U.S. BORAX, INC.

(Filed Jan. 30, 1992)

This action was commenced by K.C. 1986 Limited Partnership ("K.C. 1986") in 1993 pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980, ("CERCLA") 42 U.S.C. § 9601, *et seq.*, and U.S. Borax, Inc. ("Borax") was named as a Defendant. Subsequently, Borax filed a Third-Party Complaint against Nancy Reade Forster as the personal representative of the Estate of Charles F. Reade, Sr. (the "Estate"). Borax seeks contribution from the Estate to pay for past and future response costs resulting from the contamination of property located on Holmes Road in

Kansas City, Missouri (the "Site"). Borax contends that Charles F. Reade, Sr. ("Reade") (and, since his death, his successor Estate) is liable as an owner/operator of a site where hazardous wastes were disposed. The Estate has now filed a Motion to Dismiss the Third-Party Claim, and Borax has filed a Motion to Strike the Estate's Motion to Dismiss.

I. Background

It is alleged that for some period of time Reade operated the Reade Manufacturing Company ("Reade Manufacturing"), a family business which mixed herbicides at a number of locations, including the Site in Kansas City, Missouri. Reade Manufacturing operated the herbicide facility at the Site for at least twenty years before leasing the Site to Borax. Borax occupied the Site as lessee from 1963 to 1968, and Reade Manufacturing then sold the Site to Habco, Inc. Borax's Third-Party Complaint claims that Reade is personally liable under CERCLA as an owner/operator of the Site because hazardous waste was disposed of at the Site while Reade was an officer of Reade Manufacturing.

Reade died on May 16, 1995. The Estate went through probate in Florida State Court, and Borax filed its claim in that action as well. In the probate action, the Estate Petitioned to strike Borax's claim alleging that it was not filed within the three (3) months permitted by the Florida non-claim statute. Borax argued that it was not properly notified of Reade's death and that CERCLA preempts the Florida non-claim statute. On October 22, 1997, the Florida Probate Court struck Borax's probate claim, finding

that the notice given by the Estate was constitutional and that CERCLA did not preempt the Florida non-claim statute. The written Order issued by the Florida court gave no explanation for its rulings. The Estate now asserts, in its Motion to Dismiss in this Court, that the Florida Probate Court's Order must be given preclusive effect in this federal CERCLA action under the full faith and credit statute, 28 U.S.C. § 1738, and that Borax's CERCLA claim must be dismissed because there is no possibility that Borax can collect on any judgment entered in this case given that its claim against the Estate was struck by the Florida Probate Court. Borax seeks to strike the Estate's Motion to Dismiss claiming that the Motion does not comply with the Federal Rules of Civil Procedure or the Local Rules because it relies on a matter outside the pleadings and should have been filed as a Motion for Summary Judgment.

II. Borax's Motion to Strike the Estate's Motion to Dismiss

While Borax is correct that the Estate's Motion should have been for summary judgment and should have complied with Federal Rule of Civil Procedure 56 and Local Rule 56, the Court will not strike the Estate's Motion because of the procedural defects. In the Estate's Motion and the attached exhibits, the Estate makes it clear that its request for dismissal is based on the favorable ruling which it received in the Florida Probate Court. There is no genuine issue about the authenticity of the Probate Court's Order, so only legal issues remain to be decided by the Court.

Because it is clear that only legal issues are raised by the Estate's Motion to dismiss, it would be an exercise in formalism to require the Motion to be submitted to this Court as a Motion for Summary Judgment. Furthermore, after Borax filed its Motion to Strike, the Estate did respond with a Statement of Uncontroverted Facts as required by the Local Rules.

III. The Estate's Motion to Dismiss

In its Motion to dismiss, the Estate claims that the Florida Probate Court's Order of October 22, 1997, must be given preclusive effect in this CERCLA action because of 28 U.S.C. § 1738, the full faith and credit statute. That statute requires a federal court to give a state court judgment the same preclusive effect as the courts of the same state would give to the judgment. *Simmons v. O'Brien*, 77 F.3d 1093, 1096 (8th Cir. 1996). Such deference "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980). The application of 28 U.S.C. § 1738 in this case, however, presents a difficult question of federal/state comity because CERCLA actions are exclusively within the jurisdiction of the federal court and because the CERCLA claim in this Court is not a subsequently filed action. The CERCLA claim against the Estate was filed in this Court and the Florida Probate Court contemporaneously, and the issues decided by the Probate Court were contemporaneously presented to this Court in Borax's Motion for Summary

Judgment against the Estate. It is only because the Probate Court entered its Order first that preclusion is now an issue.

The Estate correctly points out that the U.S. Supreme Court has held that "a state court judgment may in some cases have a preclusive effect in a subsequent action within the exclusive jurisdiction of the federal court." *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 380 (1985). Because 28 U.S.C. § 1738 does not always require preclusion in such cases, the Supreme Court crafted a two-step test for determining collateral estoppel. The trial court must first look at the law of the state to determine if the state would find that collateral estoppel applied. If the state court would apply collateral estoppel precluding relitigation of the issues, the federal court must then see if a statute passed after 28 U.S.C. § 1738 was passed has amended by implication Congress' requirement in § 1738 that federal courts recognize state court judgments. *Marrese,* 470 U.S. at 381-82.

The Estate insists that Florida state courts would give preclusive effect to the Florida Probate Court Order. The Estate specifically rejects Borax's claim that the public policy of CERCLA is grounds for finding that collateral estoppel should not apply. Of course, there would never be a situation where a state court in Florida would be confronted with this collateral estoppel question in the context of CERCLA, because CERCLA is exclusively within the jurisdiction of the federal court. Justice O'Connor, in *Marrese,* recognized this conundrum and explained that the federal court need only apply the principles of collateral estoppel adopted by the state. It need not locate a state court opinion applying or refusing

to apply collateral estoppel in the exact circumstances raised in the federal claim. *Marrese*, 470 U.S. at 381-82.

In at least one case, the Florida courts have recognized the exceptions to collateral estoppel contained in § 28 of the Restatement (Second) of Judgment. In *State of Florida v. Freund*, 626 So.2d 1043 (Fl. App. 4 Dist., 1993), the Florida court stated:

> [R]elevant to the issue are two exceptions to the application of collateral estoppel found in RESTATEMENT (SECOND) OF JUDGMENT § 28 (1980), p. 273:
>
> > '[A]lthough an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . .
> >
> > (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them. . . .
> >
> > (5) There is a clear and convincing need for a new determination of the issues (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action.

Id. at 1046, (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1980), p. 273). Because Florida courts are willing to

recognize these exceptions in their own application of collateral estoppel doctrine, it is appropriate for this court to apply these principles in deciding whether or not collateral estoppel should apply in this case.

Collateral estoppel should not be applied in this CERCLA action because of factors relating to the allocation of jurisdiction between the state and federal courts. When it enacted CERCLA, Congress decided to make polluters pay the cost for cleaning up their pollution. Congress placed CERCLA jurisdiction exclusively in the federal courts. This jurisdictional design makes sense given the interstate consequences of pollution, the mobility of persons disposing of hazardous waste, and the possible reluctance of state courts to subject its citizens to the broad-reaching remedies and obligations imposed by CERCLA. This jurisdictional design would be thwarted if preclusive effect were given to a state court judgment regarding the preemptive effect of a federal law in a case which pits an individual Florida state resident against a non-resident corporation, particularly where the issues are raised at the same time in both the federal and state court actions, and the contaminated property is not located in Florida. It may also be that where the federal and state claim are proceeding contemporaneously, it would violate principles of *Donovan v. City of Dallas*, 377 U.S. 408, *reh'g denied*, 379 U.S. 871 (1964), to give preclusive effect to the state court judgment where to do so would interfere with this court's power over a named party. A state court has no authority to directly or indirectly control the jurisdiction of the federal court.

Borax makes the further argument that other parties to this litigation may be adversely affected if collateral

estoppel prevents this Court from relitigating the issues ruled by the Florida Probate Court. Presently, no other party has a claim against the Estate, but all the other parties will benefit indirectly from Borax's claim against the Estate, because the Estate would have to contribute to the cleanup if found liable, thereby reducing the contribution that the other parties would have to make.

The Court does recognize the possibility that the other parties in this litigation could file claims against the Estate for contribution. If such claims were filed, the Estate would still be in the position of having to deal with the CERCLA preemption issue because only Borax was a party to the probate litigation in Florida. The decision of the probate judge in Florida would have no preclusive effect on their claims against the Estate. While this may demonstrate how the other parties in the litigation would not be injured by the application of collateral estoppel to Borax, it also demonstrates the futility of applying collateral estoppel to Borax. Ultimately, this Court must decide the issue of preemption and the liability of the Estate for its share of the Site contamination. Any payment by the Estate will necessarily benefit all of the other parties, including Borax.

This Court, therefore, finds that the Florida Probate Court's Order does not collaterally estop this Court from relitigating the question of whether CERCLA preempts the Florida non-claim statute and the propriety of using a trust fund theory to reach the assets of the Estate. On the other hand, the Court expressly finds that the ruling of the Probate Court concerning the adequacy of the notice in the Florida probate proceeding is collaterally estopped in this action. The adequacy of notice in a probate action

is traditionally resolved by the state courts and is subject to review through the state court system and ultimately by the United States Supreme Court. In contrast, the preemptive reach of CERCLA is appropriately decided by the federal court under the circumstances of this case because it relates to the standing of the Estate to be sued in federal court on an exclusive federal court claim and involves the enforcement of a federal court judgment.

Even if the Court were to find the preemption question, as it applies to Borax, is precluded by the Probate Court Order, it would still not dismiss the Estate from this lawsuit. The Estate relies on *Crosson v. Conlee*, 745 F.2d 896, 903 (4th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985), to support its argument that it would be futile to force the Estate to remain in this litigation if no judgment could ever be collected from it because of the Probate Court's Order. In *Crosson*, The Fourth Circuit expressly referred to the unique circumstances in that case which involved a diversity suit where there was no possibility of enforcing the judgment against the defendant because of a prior ruling in a state court action. In this case, the probate judge's Order is on appeal in Florida, and the possibility of eventually collecting a judgment against the Estate is not completely foreclosed. Furthermore, unlike *Crosson*, jurisdiction in this case is based on federal question jurisdiction, not diversity jurisdiction, raising more complicated enforcement of judgment questions, especially if claims are filed against the Estate by the remaining parties in this lawsuit. For these reasons, it is necessary for the Estate to remain in this litigation so that an orderly resolution of its CERCLA liability can be completed. Accordingly, it is

ORDERED that Borax's Motion to Strike Estate's Motion to Dismiss (Doc. #518) is DENIED. It is further

ORDERED that Estate's Motion to Dismiss (Doc. #493) is DENIED.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: 1-30-98
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

K.C. 1986 LIMITED PARTNERSHIP,	)	
Plaintiff,	)	
v.	)	Case No. 93-1062-CV-W-5
READE MANUFACTURING, et al.,	)	
Defendants,	)	
v.	)	
HABCO, INC., et al.,	)	
Third-Party Defendants.	)	

ORDER DENYING U.S. BORAX, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST THE ESTATE OF READE

(Filed Jan. 30, 1998)

This action was commenced by K.C. 1986 Limited Partnership ("K.C. 1986") in 1993 pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980, ("CERCLA") 42 U.S.C. § 9601, *et seq.*, and U.S. Borax, Inc. ("Borax") was named as a Defendant. Subsequently, Borax filed a Third-Party Complaint against Nancy Reade Forster as the personal representative of the Estate of Charles F. Reade, Sr. (the "Estate"). Borax seeks contribution from the Estate to pay for past and future response costs resulting from the contamination of property located on Holmes Road in

Kansas City, Missouri, (the "Site"). Borax contends that Charles F. Reade, Sr. ("Reade"), and the Estate as his successors, is liable as an owner/operator of a site where hazardous wastes were disposed. Borax has filed a Motion for Summary Judgment against the Estate which is opposed by the Estate.

I. Background

It is alleged that for some period of time Reade operated the Reade Manufacturing Company ("Reade Manufacturing"), a family business which mixed herbicides at a number of locations, including the Site in Kansas City, Missouri. Reade Manufacturing operated the herbicide facility at the Site for at least twenty years before leasing the Site to Borax. Borax occupied the Site as Lessee from 1963 to 1968, and Reade Manufacturing then sold the Site to Habco ("Habco"). Borax's Third-Party Complaint claims that Reade is personally liable under CERCLA as an owner/operator of the Site because hazardous waste was disposed of at the Site while Reade was an officer of Reade Manufacturing. The Estate denies that Reade is liable and further claims that Borax has not demonstrated, as a matter of law, that Borax is entitled to summary judgment.

Reade died on May 16, 1995, and his estate published a Notice of Administration on June 5, 1995. Publication was done locally in Florida. No Notice of Administration was received by Borax, and Borax alleges that it did not learn of Reade's death until March of 1997. After learning of his death, Borax filed a claim against Reade's estate in

both this CERCLA action and in the Florida court where Reade's estate was being probated.

Pending before the Court is Borax's Motion for Summary Judgment against the Estate and Suggestions in Support of that Motion, the Estate's Opposition, and Borax's Reply. In addition, numerous Motions to Strike Affidavits have been filed by both parties.

II. Standard

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). When considering a motion for summary judgment, a court must consider the evidence in the light most favorable to the nonmoving party, and the nonmoving party "must be given the benefit of all reasonable inferences." The main purpose of a motion for summary judgment, however, is to identify factually unsupported claims. If a party has the burden of proof at trial on a claim and the opposing party has filed a motion for summary judgment, the party bearing the burden of proof must identify admissible evidence sufficient to make a submissible case at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the party with the burden of proof cannot identify such evidence, the opposing party

is entitled to judgment as a matter of law. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322)).

To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 248 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)).

III. Discussion

The Estate argues summary judgment is not appropriate because there are genuine issues of material fact in dispute and because Borax's claim against the Estate is barred by Section 733.702(1) of Florida Statutes Annotated. That statute provides:

> (1) . . . [N]o claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state in any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; . . . is binding on the estate, on the personal representative, or on any beneficiary unless filed within the later of three months after the time of the first publication of the notice of administration or, as to any creditor required to be served with a copy of the notice of administration, thirty days after the date of service of such copy of the notice on the creditor, even though the personal representative has

> recognized the claim or demand by paying a part of it or interest on it or otherwise.

Borax admits that it did not file a claim against the Estate within three months after the first publication of the Notice of Administration. Borax contends, however, that it did not receive constitutionally adequate notice of Reade's death and that the Florida non-claim statute is preempted by CERCLA's three-year statute of limitations for contribution actions. *See* 42 U.S.C. § 9613. Borax clearly filed its claim against the Estate in this Court within the CERCLA statute of limitations. The question of the adequacy of the notification in the probate proceeding has already been addressed by the Probate Court in Florida and will not be reexamined by this Court. The issue of preemption and the trust fund theory will be reexamined.

A. Preemption and Trust Fund Theory

To determine whether a federal statute preempts a state statute "our sole task is to ascertain the intent of Congress." *California Fed. Sav. & Loan Assoc. v. Guerra*, 479 U.S. 272, 280-81 (1987). Preemption may be found where (1) the federal law expressly preempts state law; (2) Congressional intent to preempt state law can be implied where the scheme of federal regulation is sufficiently comprehensive to make reasonable inference that Congress left no room for supplementary regulation; (3) federal law conflicts with state law either because compliance with both federal and state law is a physical or practical impossibility, or because the state law stands as an obstacle for the accomplishment and execution of the full purposes and objectives of Congress. *Guerra*, 479

U.S. 280-81 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1962) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). To find preemption based on a conflict between federal and state law, the United States Supreme Court has said that the conflict must be significant. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). Regardless of the basis for finding preemption, the Eighth Circuit has held that in order to find that federal law preempts state law in an area traditionally regulated by the states, Congress' intent to supersede state law must be manifestly clear. *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990), *aff'd*, 501 U.S. 452 (1991).

There is a split in the jurisdictions as to whether CERCLA preempts state probate statutes of limitation. Relying on the remedial nature of CERCLA, several district courts have held either that CERCLA preempts state probate statutes of limitation or that an estate and its beneficiaries hold the decedent's assets in trust for the benefit of satisfying environmental liability of the deceased. *Steego Corp. v. Ravenal*, 830 F. Supp. 42, 47-48 (D. Mass. 1993); *Soo Line R.R. Co. v. B. J. Carney & Co.*, 797 F. Supp. 1472, 1484 (D. Minn. 1992); *Freudenberg-NOK Gen. Partnership v. Thomopoulos*, 1991 WL 325290 (D.N.H. 1991); *State of N.C. ex rel. Howes v. W. R. Peele Sr. Trust*, 876 F. Supp. 733, 743 (E.D.N.C. 1995); *United States v. Martell*, 887 F. Supp. 1183 (N.D. Ind. 1995). In contrast, the Third Circuit in *Witco Corp. v. Beekhuis*, 38 F.3d 682 (3d Cir. 1994), the only circuit which has addressed the issue, held that CERCLA did not preempt a Delaware probate statute of limitation.

The Third Circuit in *Witco* articulated six reasons for finding no preemption. The Court first noted that Congress did not expressly preempt state probate laws in the CERCLA statute or even refer to estates when it listed parties responsible for cleanup. Second, the *Witco* Court explained that it was possible to comply with both the Delaware probate and the CERCLA statutes of limitation because the CERCLA claim could have been made within the eight-month period allotted under the Delaware probate statutes for filing a claim against an Estate. Third, the Court gave great weight to a state's interest in the prompt settlement of probate estates and the fact that probate is an area of law traditionally handled by the states without federal intervention. Fourth, the Court concluded that "Congress created [the innocent landowner defense under 42 U.S.C. § 9607(b)(3)] in order not to disturb state law controlling the descent and distribution of property." *Witco*, 38 F.3d at 689. The Court reasoned that because Congress permitted an "innocent" third party to keep real property acquired by inheritance without contributing to the cost of cleaning up the property. Congress did not want to disturb state law controlling descent and distribution. Fifth, the Court held that the Delaware probate statute did not stand as an obstacle to Congressional intent. Sixth, the Court concluded that preemption would be inherently unworkable, because "[t]he possibility of a CERCLA claim arising long after the settlement of the estate would hang its dark cloud over any such settlement, thereby compromising the goals of certainty and promptness in the settlement and distribution of decedent's estate." *Witco*, 38 F.3d at 690.

Although CERCLA was a product of legislative compromise and the blending of three separate bills, it is clear in each of those three bills that Congress wanted the persons and businesses which released hazardous waste into the environment to pay the costs of cleaning up the hazardous waste. 20 HARV. ENVTL. L. REV. 199, 271-78 (1996); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982). The mantra of CERCLA is that the guilty must pay. The statute itself also makes clear that Congress intended CERCLA to be uniformly enforced in federal court using federal law. The question in this case is whether the Florida non-claim statute interferes with these Congressional objectives and is, therefore, preempted by CERCLA. This Court finds that it does. Because the Estate of Reade was open at the time the CERCLA claim was filed and because the CERCLA statute of limitation has not run, the CERCLA claim against the Estate is not barred by the Florida non-claim statute and a trust shall be imposed on the assets of the Estate to guarantee payment of any judgment in this case against the Estate.

While Congress did not expressly preempt probate non-claim statutes, the structure of CERCLA makes it clear that Congress intended the federal courts to prosecute CERCLA actions using federal, not state law. CERCLA provides that owners and operators of property at the time hazardous waste is disposed shall be liable for an equitable share of the cleanup. This liability exists "notwithstanding any other provision or rule of law and subject only to the defenses in subsection (b) of this section." 42 U.S.C. § 9607(a). In 42 U.S.C. § 9613(f)(1), Congress provided that a CERCLA contribution action

was to be "brought according to the Federal Rules of Civil Procedure and shall be governed by federal law." In the same section it provided a specific, federal statute of limitation for CERCLA contribution actions. 42 U.S.C. § 9613(g)(3). A federal statute of limitation is especially important because Congress knew that CERCLA liability would extend to past owners of property. *See* 42 U.S.C. § 9607(a) which references "owners and operators *at the time* hazardous waste is disposed." (emphasis added). Given the likely lag time between contamination and a CERCLA action, state statutes of limitation might have run, increasing the risk that the cost of cleanup would be borne by the federal government, contrary to the manifest intent of Congress. In a separate section of CERCLA, unrelated to contribution, Congress went so far as to create a federal discovery rule for determining when a *state* statute of limitation would begin to run on a *state* claim for property damage and personal injury caused by exposure to hazardous substances or pollutants or contamination. 42 U.S.C. § 9658(a)(1). This provision shows how pervasively Congress intended federal law to control the national response to environmental problems.

Congress also made it clear that the party or parties producing pollution must pay the cost of cleaning up the pollution. That liability exists "notwithstanding any other provision or rule of law." 42 U.S.C. § 9607(a). On the other hand, Congress did not intend the innocent to pay. In 42 U.S.C. § 9607(b), Congress provides that no liability exists for landowners who have no connection with the disposition of the toxic waste and who have taken reasonable precautions with respect to the toxic waste. Evidence of Congress' intent to protect innocent third parties is

also found in 42 U.S.C. § 9607(1), where Congress provided that a lien would attach against all real property of a party liable under CERCLA, but provided protection for third party purchasers of the property whose interest in the property predated notice of the federal lien. Congress went on to say, however, that nothing in the section "should be construed to prevent an action to recover cost as against liable persons [under CERCLA]." 42 U.S.C. § 9607(1)(4). The innocent are to be protected, but those liable under CERCLA must pay.

In this case, it is alleged that Reade is liable under CERCLA as an owner/operator. If this is true, Reade is not an innocent party, nor is the estate. An estate is a fictional entity created by the law as an extension of the decedent to allow for the orderly distribution of assets and liabilities. An estate, therefore, cannot be innocent if the decedent is not innocent. The Third Circuit's explanation that the "innocent landowner" defense was intended to protect state laws controlling state inheritance schemes does not take into account that Congress protected all current property owners who were unconnected to the contamination, not just persons who acquired the property by inheritance. Congressional focus throughout the statute is on the innocence of the party holding the property, not the manner by which the property was acquired. Just because someone who inherits land does not have to pay for the cleanup of the land does not mean that the assets which are in the estate should be given to the beneficiaries. There is a big difference between not having to pay for the cleanup and not getting the decedent's assets. In the first scenario, the beneficiary simply might

have to spend his own money. In the second scenario, the beneficiary does not get to keep the decedent's money.

It is true that CERCLA incorporates by reference the Federal Rules of Civil Procedure, and Fed. R. Civ. P. 17 (b) provides that the capacity of a representative in a federal court shall be determined by the law of the state where the federal court sits. It is illogical, however, to conclude that Congress by referencing the Federal Rules intended to permit state statutes of limitation to control CERCLA contribution actions, thereby altering its earlier express statement concerning federal statutes of limitation and its rules concerning substantive liability. Finally, while it is necessary in a diversity case for state capacity laws to control because of the mandate of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); it is not necessary in a federal question case. Compare *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) with *Roby v. Corporation of Lloyd's*, 796 F. Supp. 103 (S.D.N.Y. 1992); and *Sierra Ass'n for Env't. v. Federal Energy Regulatory Comm'n.*, 744 F.2d 661 (9th Cir. 1984).

Nor would it unduly burden estate administration for a decedent's CERCLA liability to be determined in federal court. Probate courts in Florida and elsewhere have rules concerning contingency claims. Under Florida probate law, an estate can be closed without final determination of contingency claims and the probate court may impose a trust to secure payment. *See* § 733.705, Fla. Stat. Ann. (West 1997). when a federal court imposes a trust on the assets of the estate, it is doing little more than probate courts have traditionally done with contingent claims, except the time during which the contingency claim can be filed is extended according to federal law.

Finally, to apply the Florida non-claim statute in this case would permit the Estate to escape all liability while other occupiers of the Site would end up paying the cost of cleanup even though their pollution might be substantially less or their period of occupancy negligible in comparison. Indeed, to the extent state statutes of limitation for probate, dissolution of corporations and successor liability of corporations were to prevail, it would be governments or large ongoing corporations or enduring, charitable organizations which would most often bear the costs of pollution cleanup. This would be inconsistent with Congress' statutory scheme in CERCLA.

B. Liability

While the Court finds that CERCLA preempts the state probate statute of limitations, the Court declines to enter a summary judgment at this time. Having reviewed the numerous motions to strike and the attached affidavits in support and in opposition to this Motion for Summary Judgment, it appears that there is a genuine issue of material fact in dispute precluding entry of a summary judgment. This is, in part, because the movant, Borax, has the burden of proof at trial on its claim and, therefore, the credibility of its affiants must be evaluated by the factfinder. Furthermore, even using Borax's analysis of the applicable legal standard, inferences must be made from the facts, a function reserved for the factfinder. Accordingly, it is hereby

ORDERED that Borax's Motion for Summary Judgment against the Estate of Reade (Doc. #294) is DENIED.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: 1-30-98
Kansas City, Missouri

42 U.S.C.S. § 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue. Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by title II of this Act, or to the review of any regulation promulgated under the Internal Revenue Code of 1954 [*26 USCS §§ 1* et seq.].

(d) Litigation commenced prior to December 11, 1980 No provision of this Act shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to enactment of this Act [enacted Dec. 11, 1960].

(e) Nationwide service of process. In any action by the United States under this Act, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [*42 USCS § 9607(a)*], during or following any civil action under section 106 [*42 USCS § 9606*] or under section 107(a) [*42 USCS § 9607*(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107 [*42 USCS § 9606* or 9607].

(2) Settlement. A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of

the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement.

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 101(6) [*42 USCS § 9601*(6)]) under this Act, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 301(c) [*42 USCS § 9651*(c)].

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 120 [*42 USCS § 9620*] (relating to Federal facilities), or any vessel or facility at which a remedial action under this Act is otherwise scheduled, an action for damages under this Act must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this Act with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120 [*42 USCS § 9604*(b) or § 9620] (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before the enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986.]

(2) Actions for recovery of costs. An initial action for recovery of the § costs referred to in section 107 [*42 USCS § 9607*] must be commenced –

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a

determination to grant a waiver under section 104(c)(1)(C) [*42 USCS § 9604*(c)(1)(C)] for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 107 [*42 USCS § 9607*] for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 107 [*42 USCS § 9607*] for recovery of costs at any time after such costs have been incurred.

(3) Contribution. No action for contribution for any response costs or damages may be commenced more than 3 years after –

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 122(g) [*42 USCS § 9622*(g)] (relating to de minimis

settlements) or 122(h) [*42 USCS § 9622*(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation. No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this title [*42 USCS §§ 9601* et seq.] more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments. Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 119 [*42 USCS § 9619*], an action under section 107 [*42 USCS § 9607*] for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents The time limitations contained herein shall not begin to run –

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review. No Federal court shall have jurisdiction under Federal law other than under section 1332

of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 [*42 USCS § 9621*] (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 104 [*42 USCS § 9604*], or to review any order issued under section 106(a) [*42 USCS § 9606*(a)], in any action except one of the following:

(1) An action under section 107 [*42 USCS § 9607*] to recover response costs § or damages or for contribution.

(2) An action to enforce an order issued under section 106(a) [*42 USCS § 9606*(a) or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 106(b)(2) [*42 USCS § 9606*(b)(2)].

(4) An action under section 310 [*42 USCS § 9659*] (relating to citizens suits) alleging that the removal or remedial action taken under section 104 [*42 USCS § 9604*] or secured under section 106 [*42 USCS § 9606*] was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 106 [*42 USCS § 9606*] in which the United States has moved to compel a remedial action.

(i) Intervention. In any action commenced under this Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action

may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial review.

(1) Limitation. In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard. In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy. If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors. In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would

have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures.

(1) Administrative record. The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures.

(A) Removal action. The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code [*5 USCS § 501* et seq.] establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

§ (B) Remedial action The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 117(a)(2) [*42 USCS § 9617*(a)(2)] (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action. For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 117(d) [*42 USCS § 9617*(d)], The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code [*5 USCS §§ 501* et seq.] to carry out the requirements of this subparagraph.

(C) Interim record. Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

(D) Potentially responsible parties. The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before

selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(1) Notice of actions. Whenever any action is brought under this Act in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

Fla. Stat. § 733.702 Limitations on presentation of claims.

(1) If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed within the later of 3 months after the time of the first publication of the notice of administration or, as to any creditor required to be served with a copy of the notice of administration, 30 days after the date of service of such copy of the notice on the creditor, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the beneficiaries adversely affected according to the priorities provided in this code and when the settlement is made within the statutory time for filing claims; or, within 3 months after the first publication of the notice of administration, he or she may file a proof of claim of all claims he or she has paid or intends to pay.

(2) No cause of action heretofore or hereafter accruing, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be

made, whether an action is pending at the death of the person or not, unless the claim is filed within the time periods set forth in this part.

(3) Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed on the grounds of timeliness or otherwise unless the court extends the time in which the claim may be filed. Such an extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless such an extension has been granted. If the personal representative or any other interested person serves on the creditor a notice to file a petition for an extension or be forever barred, the creditor shall be limited to a period of 30 days from the date of service of the notice in which to file a petition for extension.

(4) Nothing in this section affects or prevents:

(a) A proceeding to enforce any mortgage, security interest, or other lien on property of the decedent.

(b) To the limits of casualty insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he or she is protected by the casualty insurance.

(c) The filing of a claim by the Department of Revenue subsequent to the expiration of the time for filing claims provided in subsection (1), provided it does so file within 30 days after the service of the inventory by the personal representative on the department or, in the event an amended or supplementary inventory has been

prepared, within 30 days after the service of the amended or supplementary inventory by the personal representative on the department.

(d) The filing of a cross-claim or counterclaim against the estate in an action instituted by the estate; however, no recovery on such a cross-claim or counterclaim shall exceed the estate's recovery in such an action.

(5) Nothing in this section shall extend the limitations period set forth in s. 733.710.

Fla. Stat. § 733.705 Payment of and objection to claims.

(1) The personal representative shall pay all claims within 1 year from the date of first publication of notice of administration, provided that the time shall be extended with respect to claims in litigation, unmatured claims, and contingent claims for the period necessary to dispose of such claims pursuant to subsections (4), (5), (6), and (7). The court may extend the time for payment of any claim upon a showing of good cause. No personal representative shall be compelled to pay the debts of the decedent until after the expiration of 5 months from the first publication of notice of administration. If any person brings an action against a personal representative within the 5 months on any claim to which the personal representative has filed no objection, the plaintiff shall not receive any costs or attorneys' fees if he or she prevails, nor shall the judgment change the class of the claim for payment under this code.

(2) On or before the expiration of 4 months from the first publication of notice of administration or within 30 days from the timely filing of a claim, whichever occurs later, a personal representative or other interested person may file a written objection to a claim. An objection to a claim shall contain a statement that the claimant is limited to a period of 30 days from the date of service of the objection within which to bring an action on the claim as provided in subsection (4). The failure to include such a statement in the objection shall not affect the validity of the objection but may be considered as good cause for extending the time for filing an action or proceeding after the objection is filed. If an objection is filed, the person filing it shall serve a copy of the objection by registered

or certified mail to the address of the claimant or the claimant's attorney as shown on the claim or by delivery to the claimant to whose claim the person objects or the claimant's attorney of record, if any, not later than 10 days after the objection has been filed, and also on the personal representative if the objection is filed by any interested person other than the personal representative. The failure to serve a copy of the objection constitutes an abandonment of the objection. For good cause, the court may extend the time for filing an objection to any claim or may extend the time for serving the objection. The extension of time shall be granted only after notice.

(3) An objection by an interested person to a personal representative's proof of claim shall state the particular item or items to which the interested person objects and shall be filed and served as provided in subsection (2). Issues of liability as between the estate and the personal representative individually for items paid by the personal representative and thereafter listed in a personal representative's proof of claim shall be determined in the estate administration proceeding, in a proceeding for accounting, surcharge, or other appropriate proceeding, whether or not an objection has been filed. If an objection to an item listed as to be paid in a personal representative's proof of claim is filed and served, and the personal representative has not paid the item, the other subsections of this section shall apply as if a claim for the item had been filed by the claimant; but if the personal representative has paid the claim after listing it as to be paid, issues of liability as between the estate and the personal representative individually shall be determined in the manner provided for an item listed as paid.

(4) The claimant is limited to a period of 30 days from the date of service of an objection within which to bring an independent action upon the claim, or a declaratory action to establish the validity and amount of an unmatured claim which is not yet due but which is certain to become due in the future, or a declaratory action to establish the validity of a contingent claim upon which no cause of action has accrued on the date of service of an objection and that may or may not become due in the future. For good cause, the court may extend the time for filing an action or proceeding after objection is filed. The extension of time shall be granted only after notice. No action or proceeding on the claim shall be brought against the personal representative after the time limited above, and any such claim is thereafter forever barred without any court order. If an objection is filed to the claim of any creditor and an action is brought by the creditor to establish his or her claim, a judgment establishing the claim shall give it no priority over claims of the same class to which it belongs.

(5) A claimant may bring an independent action or declaratory action upon a claim which was not timely filed pursuant to s. 733.702(1) only if the claimant has been granted an extension of time to file the claim pursuant to s. 733.702(3).

(6) If an unmatured claim has not become due before the time for distribution of an estate, the personal representative may prepay the full amount of principal plus accrued interest due on the claim, without discount and without penalty, regardless of any prohibition against prepayment or provision for penalty in any instrument on which the claim is founded. If the claim is

not prepaid, no order of discharge may be entered until the creditor and personal representative have filed an agreement disposing of the claim, or in the absence of an agreement until the court provides for payment by one of the following methods:

(a) Requiring the personal representative to reserve such assets as the court determines to be adequate to pay the claim when it becomes due; in fixing the amount to be reserved, the court may determine the value of any security or collateral to which the creditor may resort for payment of the claim and may direct the reservation, if necessary, of sufficient assets to pay the claim or to pay the difference between the value of any security or collateral and the amount necessary to pay the claim. If the estate is insolvent, the court may direct a proportionate amount to be reserved. The court shall direct that the amount reserved be retained by the personal representative until the time that the claim becomes due, and that so much of the reserved amount as is not used for payment be distributed thereafter according to law;

(b) Requiring that the claim be adequately secured by a mortgage, pledge, bond, trust, guaranty, or other security, as may be determined by the court, the security to remain in effect until the time that the claim becomes due, and that so much of the security or collateral as is not needed for payment be distributed thereafter according to law; or

(c) Making such other provision for the disposition or satisfaction of the claim as is equitable, and in a manner so as not to delay unreasonably the closing of the estate.

(7) If no cause of action has accrued on a contingent claim before the time for distribution of an estate, no order of discharge may be entered until the creditor and the personal representative have filed an agreement disposing of the claim or, in the absence of such agreement, until:

(a) The court determines that the claim is adequately secured or that it has no value,

(b) Three months from the date on which a cause of action accrues upon the claim, provided that no action on the claim is then pending,

(c) Five years from the date of first publication of notice of administration, or

(d) The court provides for payment of the claim upon the happening of the contingency by one of the methods described in paragraph (a), paragraph (b), or paragraph (c) of subsection (6),

whichever occurs first. No action or proceeding may be brought against the personal representative on the claim after the time limited above, and any such claim shall thereafter be forever barred without order of court. If an action is brought within the time limited above, a judgment establishing the claim shall give it no priority over claims of the same class to which it belongs.

(8) No interest shall be paid by the personal representative or allowed by the court on a claim until the expiration of 5 calendar months from the first publication of the notice of administration, unless the claim is founded on a written obligation of the decedent providing for the payment of interest. Interest shall be paid by

the personal representative on written obligations of the decedent providing for the payment of interest. On all other claims, interest shall be allowed and paid beginning 5 months from the first publication of the notice of administration.

(9) The court may determine all issues concerning claims or matters not requiring trial by jury.

(10) An order for extension of time authorized under this section may be entered only in the estate administration proceeding.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK, as Personal Representative of the Estate of Rudolph J. Leitgeb, Appellant,

v.

General and Mrs. Alexander M. HAIG, Jr., Appellees.

No. 96-1670.

District Court of Appeal of Florida,
Fourth District.

April 16, 1997.

Rehearing and Certification Denied
June 12, 1997

Peter Matwiczyk of Heinrich Gordon Hargrove Weihe & James, P.A., Palm Beach, for appellant.

Robert M. Weinberger of Cohen, Chernay, Norris, Weinberger & Harris, North Palm Beach, for appellees.

STONE, Judge.

We reverse an order granting a motion to extend time for filing a claim against an estate.

Appellees purchased a residence from the decedent. The decedent received a purchase money mortgage on the residence, and also executed a five-year guaranty in favor of Appellees. The guaranty provided that a portion of the house would be free from leaks and cracks caused by structural defects. In the event a defect appeared within the guaranty period, the decedent would repair it or Appellees would be entitled to a set-off against the mortgage. The guaranty set forth a procedure for making claims under the agreement.

The decedent died and letters of administration were issued to Appellant. A notice of administration was published and the claims period expired on February 8, 1995.

The personal representative, who possessed copies of the mortgage and guaranty, wrote Appellees a letter dated January 30, 1995, to verify the existence of the note as an estate asset. At the same time, Appellees, unaware of his death, attempted to reach the decedent by mail. They sent the letter to the decedent's former place of employment, despite a requirement that any notice be mailed to his home address. The decedent had not been at the former place of employment for several years.

The personal representative did not receive Appellees' letter until February 16, eight days after the period for filing claims against the estate had expired. The trial court granted Appellees' petition to extend time to file a claim against the estate. The court reasoned that Appellees were reasonably ascertainable creditors who should have received actual notice of the filing of the decedent's estate.

All claims against an estate, whether due or not, and whether direct or contingent, must be filed in a probate proceeding within ninety days after the first publication of notice of administration. § 733.702(1), Fla. Stat. (1995). The court can extend this time only upon a showing of fraud, estoppel, or insufficient notice of the claims period. § 733.702(3); *American & Foreign Ins. Co. v. Dimson*, 645 So.2d 45 (Fla. 4th DCA 1994).

Appellees contend that they received insufficient notice of the claims period because they were not personally served with notice of the administration of the decedent's estate. Section 733.212(4)(a), Florida Statutes, provides that a personal representative is required to "promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable and shall serve on those creditors a copy of the notice within three months after the first publication of the notice." This statute and Florida's probate rules were amended to comply with Supreme Court's ruling in *Tulsa Prof'l Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). *See In re Rules of Probate and Guardianship Procedure*, 537 So.2d 500 (Fla.1988); *In re Estate of Gleason*, 631 So.2d 321 (Fla. 4th DCA 1994); *In re Estate of Hill*, 582 So.2d 701 (Fla. 1st DCA 1991).

Pope holds that if a party's identity as a creditor is known or reasonably ascertainable, due process requires the personal representative to give notice by any means that is certain to ensure actual notice of the running of the non-claim period. *Pope*, 485 U.S. at 491, 108 S.Ct. at 1348; *American & Foreign Ins. Co. v. Dimson*, 645 So.2d 45 (Fla. 4th DCA 1994) (en banc). *See also In re Estate of Puzzo*, 637 So.2d 26 (Fla. 4th DCA 1994).

However, actual notice is only owed to ascertainable creditors. Such notice is not due to contingent or conjectural claimants. Because we find that Appellees were contingent claimants, they were not entitled to actual notice. The Florida Supreme Court, in recognizing that "the law universally favors promptness in closing

estates," has defined contingent claims in the following way:

> 'A contingent claim is one where the liability depends upon some future event, which may or may not happen, which renders it uncertain whether there ever will be a liability. Nonclaim statutes have been applied to claims arising from a breach of covenant in a deed; *to guaranty*, suretyship and endorsement contracts; obligations contained in a lease; breach of contract to convey land; * * * .'

Fowler v. Hartridge, 156 Fla. 585, 24 So.2d 306, 309 (1945), (emphasis added) (citations omitted), quoting *American Sur. Co. of N.Y. v. Murphy*, 151 Fla. 151, 9 So.2d 355, 357 (1942). *See also Spohr v. Berryman*, 589 So.2d 225 (Fla.1991); *Jones v. Sun Bank/Miami, N.A.*, 609 So.2d 98 (Fla. 3d DCA 1992); *In re Klotz Estate*, 394 So.2d 509 (Fla. 5th DCA 1981); *In re Shaw's Estate*, 340 So.2d 491 (Fla. 3d DCA 1976).

The Supreme Court, recognizing the burden which actual notice places on estate administration, stated:

> Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to the knowledge of the common trustee. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the name of due process.

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 317, 70 S.Ct. 652, 658-59, 94 L.Ed. 865 (1950). *See also Pope*, 485 U.S. at 490, 108 S.Ct. at 1347-48 ("it is reasonable to dispense with actual notice to those with mere conjectural claims.")

Appellees' claim must be contingent because in order for a cause of action to accrue under the guaranty agreement, Appellees would have to prove that there was a defect that was covered under the guaranty. We note that even if it could be determined that the alleged defects are covered under the guaranty, the amount of the potential claim has yet to be quantified.

Because Appellees' claim was contingent, they were not entitled to actual notice of the claims period, and must have filed their claim within 90 days after publication notice. Since the claim was not filed in a timely manner, the trial court was without discretion to grant Appellees' motion for an extension of the claims period. Florida Statute § 733.702(3) states that:

> Any claim not timely filed as provided in this section is barred . . . unless the court extends the time in which the claim may be filed. Such an extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period.

This court recently recognized that this section was a "statute of nonclaim" rather than merely a "statute of limitation," and as such operated as an automatic bar to untimely claims. *See Comerica Bank & Trust v. SDI Operating Partners*, 673 So.2d 163 (Fla. 4th DCA 1996).

Notwithstanding the foregoing, we recognize that the guaranty may give Appellees a right to set-off the amount of the unpaid claims against the amount owing on the mortgage. The issues before this court do not involve, nor have the parties addressed, set-off or counterclaim rights Appellees may retain with respect to the mortgage and this opinion should not be construed as addressing such.

WARNER and POLEN, JJ., concur.